

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 81-29
KURT ERLANSON)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On June 1, 1981, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Kurt Erlanson ("Grievant"), Substance Abuse Counselor for the State Department of Social and Rehabilitation Services ("SRS"). The grievance alleged the State had no just cause in imposing a five-day suspension on Grievant.

A hearing was held before the full Board December 3, 1981, in the Board hearing room in Montpelier. Michael Zimmerman, Counsel for VSEA, represented Grievant. The State was represented by Assistant Attorney General Scott Cameron. Findings of Fact and Memoranda of Law were filed by the State and VSEA on December 24, 1981, and December 28, 1981, respectively.

FINDINGS OF FACT

1. Grievant was, at all times relevant, a permanent status employee of the State of Vermont, and as such entitled to all the rights afforded to such employees under the Agreement between the State of Vermont and VSEA, in effect for the period July 1, 1979, to June 30, 1981 ("Agreement").

2. Grievant has been employed for approximately eight years by SRS, Alcohol and Drug Abuse Division ("ADAD"). His position title was Substance Abuse Counselor, and his pay scale was 13. During the entire period of his employment, Grievant's work place was in Springfield, Vermont, where he served as the only Substance Abuse Counselor in the area.

3. Grievant's job duties involve professional counseling and rehabilitation work with alcoholics, problem drinkers, and affected family members (Grievant's Exhibit #1). Substance Abuse Counselors are required to respond to case situations which can and do arise at any time. It is not unusual for a Substance Abuse Counselor to be called upon to meet needs of his clients during weekends or evenings, and Counselors are entitled to take compensatory time off for hours spent working on cases which are outside normal work hours. Grievant's normal working hours are from 7:45 a.m. to 4:30 p.m.

4. As part of his early training for the position, Grievant attended a training session given by Dr. Frances Nye, a psychiatrist who served as a consultant to SRS. One of the topics of that training session was what legal responsibility counselors have concerning their clients' medication. Dr. Nye's instructions to the group attending was not to dispense clients' drugs; that such drugs only be dispensed by a doctor, a nurse, the client, or a member of the client's family. Grievant believed this meant he was not to handle clients' drugs in any event.

5. SRS has no stated policy on handling clients' drugs, with the exception that employees are not to dispense antabuse.

6. Since some time in 1980, Grievant has been a member of the Board of Trustees of Safe House, Incorporated, a private, non-profit corporation which maintained a residence for recovering alcoholics in Springfield, Vermont. The Board of Trustees, on which Grievant served as secretary, was composed of about 13 members of the community. The purpose of the residence (which was called a "3/4-way house") was to provide a setting, with minimal supervision, for alcoholics on the road to recovery. Grievant negotiated an agreement with his ADAD supervisors, Steve Gold and Steve Girard, that being involved in the operation of Safe House would be part of his job.

7. One of the cardinal rules of Safe House was that residents were not permitted to drink alcoholic beverages. Violators were evicted.

8. On January 20, 1981, at approximately 4:30 p.m., Grievant received a telephone call at his office from the manager of Safe House. The manager requested Grievant's assistance in evicting an intoxicated resident from Safe House. The resident who the manager desired to evict was one of Grievant's clients, i.e., Grievant in his capacity as a Substance Abuse Counselor counseled this particular resident.

9. The resident was a 61-year-old man, who was about 5'7" in height, and who weighed between 115 and 120 pounds. The resident was a chronic alcoholic (i.e., for between 30-40 years), but had been "dry" for about two and one-half months. He also had a moderate case of emphysema.

10. After he had received the manager's call, and had agreed to assist the manager in evicting the resident, Grievant, prior to leaving his office, made a few telephone calls in order to find another Safe House Board of Trustees member to go along with him to assist in the

eviction, in case the resident became unruly. Grievant was unsuccessful, however, and left his office. He arrived at Safe House at approximately 4:45 p.m.

11. Upon his arrival at Safe House, Grievant first discussed the situation with the manager; then made a few more telephone calls in order to find another Board of Trustees member to assist him, but was again unsuccessful. Grievant then went to the resident, who was in his room. When Grievant spoke to the resident, the resident was obviously intoxicated (i.e., he was staggering, his speech was slurred). Grievant noticed two fifth bottles of either wine or hard liquor, one empty and the other half-empty. Grievant did not know what kind of alcohol the resident had drunk, or how much. Grievant did not know whether the resident had taken any drugs with the alcohol.

12. Between 5:15 and 5:30 p.m., after Grievant had spoken to the resident, Grievant telephoned Canterbury Farm in order to ascertain whether the institution would accept the resident for detoxification. Canterbury Farm was a private, non-profit alcohol treatment center, located about 18 miles from Springfield. Grievant was told that the resident would be accepted for treatment only after he had been examined by a physician.

13. Between 5:30 p.m. and 5:45 p.m., Grievant, who drove his own car, took the resident to the Springfield Hospital to be examined by a doctor. Grievant and the resident were accompanied by the Safe House manager. While Grievant would have preferred to have another Board of Trustees member accompany him to the hospital because of their experience in handling intoxicated persons, Grievant asked the manager of Safe

House, who was relatively inexperienced in such matters, to do so because of Grievant's lack of success in finding any member of the Board of Trustees willing or able to do so.

14. After waiting 15 to 20 minutes at the hospital, the resident was examined by a physician's assistant. The examination was relatively short, but Grievant, the resident, and the manager had to wait at the hospital for an hour or so in order to receive the results of a blood test. The physician's assistant announced that the resident did not need to be hospitalized, thus clearing the way for his admission to Canterbury Farm.

15. After he had completed the examination of the resident, the physician's assistant wrote a prescription for 25 Librium tablets (25 mg. each) for the resident. In addition, he gave the resident one 25mg tablet, which the resident ingested. Grievant knew that the purpose of the Librium was to assist the resident during withdrawal from alcohol. The physician's assistant also instructed the resident not to take any tablets until after he arrived at Canterbury Farm. Grievant heard these instructions.

16. The drug Librium (Chlordiazepoxide) is a tranquilizer, and belongs to a class of drugs which act on the central nervous system as a general depressant. Alcohol is also a drug which acts on the central nervous system as a general depressant. Some physicians use Librium as a substitute during the initial stages of detoxification of a patient who is being withdrawn from alcohol. The effect of Librium is to block out some or all of the withdrawal symptoms which would normally occur from the absence of alcohol in the alcoholic's system. Overdoses of Librium can result in sleepiness, confusion, coma, and diminished reflexes (Grievant's Exhibits #8-11).

17. Librium and alcohol, when taken in combination, have a synergistic effect; or a multiplied effect. Half-doses of the two drugs taken together have an exaggerated effect that is grossly disproportionate to the effect of a full dose of either drug taken separately. A synergistic effect is different from an additive effect: the latter type of effect might be illustrated by the example that two plus two equal four, while the former would be illustrated by the example that two plus two equal five, seven, nine, or eleven. The synergistic effect of mixing alcohol and Librium is unpredictable. The effects are greater in persons who are older or debilitated (Grievant's Exhibits #8-11).

18. Grievant knew that alcohol and Librium when taken together had a synergistic effect and that effect was unpredictable. Grievant was also aware that age decreases a person's drug tolerance.

19. After leaving the hospital, Grievant drove his car, which contained the resident and the Safe House manager, to a Springfield drug store in order to fill the prescription. Grievant went into the drug store himself to fill the prescription, since he did not want to allow the resident to do it, as he feared he would create a scene at the store. The purchase price of the prescription was paid with money which the resident gave to Grievant. It took Grievant between 20 and 30 minutes to fill the prescription (25 Librium, 25mg each, for a total of 625mg). Grievant read the label on the container, which contained instructions to take one tablet every four hours, or as needed. The label also indicated that the maximum dosage per day was 300 mg.

20. When he got back to his car, Grievant handed the container of Librium to the resident, instructing him not to take any until he was told to at Canterbury Farm. Grievant gave the resident the Librium

not only because the resident asked for the container, but because Grievant felt that if he retained custody of the container, he would be violating the law. That was Grievant's understanding of the law from Dr. Nye's training session.

21. Grievant then drove the resident and the Safe House manager back to Safe House. Grievant and the Safe House manager sat in the front seat of the car and the intoxicated resident sat by himself in the rear seat.

22. During the course of the trip from the drug store back to Safe House, Grievant became aware that the intoxicated resident in the back seat was ingesting Librium from the supply Grievant had given him. Grievant was unaware how many Librium the resident had taken. Grievant made no effort to stop the resident from ingesting more Librium, made no attempt to take the drug away from the resident, and did not ask the resident to turn over the Librium to him.

23. Grievant arrived back at Safe House with the resident and the Safe House manager at 8:30 p.m. At Safe House, Grievant tried again to contact another Board of Trustees member who would accompany the resident from Safe House to Canterbury Farm, but was again unsuccessful. Arrangements were then made for the resident to be taken to Canterbury Farm by the manager and another Safe House resident. Grievant did not accompany the intoxicated resident to Canterbury Farm because he was tired. Before he left Safe House, Grievant made no effort to take the Librium away from the resident, nor did he instruct the Safe House manager to inform the Canterbury Farm officials that the resident had taken an undetermined amount of Librium.

24. Grievant then returned to his home. He took no action to contact people at Canterbury Farm who would be responsible for the resident's safety, in order to inform them the resident had been ingesting Librium in excess of the prescribed dosage.

25. When the resident arrived at Canterbury Farm, the Safe House manager did not tell the professionals at Canterbury Farm that the resident had been ingesting Librium in excess of his dosage, or that he still had possession of the Librium.

26. At some point after the resident arrived at Canterbury Farm, persons in charge there discovered that 21 of the 25 Librium tablets were missing. Alarmed, they contacted the hospital and told the physician's assistant who had issued the prescription of their discovery.

27. The physician's assistant then called Grievant, and asked him to check his car to see if perhaps some of the tablets had fallen to the floor of the car. Grievant did so, but found none of the missing tablets. Grievant reported that fact to the physician's assistant, and asked what his recommendation was concerning the resident. The physician's assistant told Grievant that the resident was in no immediate danger, and did not need to be hospitalized. The resident was not subsequently hospitalized due to the incident.

28. Grievant did not put in a claim for mileage or overtime for the services he performed from 4:30-8:30 p.m. on January 20, 1981.

29. The following day, January 21, 1981, members of the staff at Canterbury Farm called Steve Girard, Grievant's supervisor, to express their concern about Grievant's handling of the situation the previous

night. They relayed the information that no one had told them about the resident taking an undetermined amount of Librium, contrary to the physician assistant's instructions. Girard then contacted Steve Gold, Substance Abuse Area Coordinator, also Grievant's supervisor, and told him of the incident of the preceding day.

30. Grievant's supervisors, Gold and Girard, discussed the situation at length in the days immediately following the incident in order to determine what the appropriate action should be. Both supervisors thought Grievant's actions demonstrated a serious mistake in judgment, that had jeopardized the life of a client in his care, and that his performance was grossly negligent on the evening of January 20, 1981. They considered dismissing Grievant for his performance that evening, but concluded Grievant deserved another chance because he was a long-term employee of the Department who had no prior record of this type of misconduct. The decision was made by Grievant's supervisors to suspend Grievant for five days.

31. By letter dated January 26, 1981, from Richard Powell II, Acting Director of ADAD, Grievant was advised of the disciplinary action against him. The letter provided, in pertinent part, as follows:

This is to advise you that you are suspended without pay for five work days, from February 2 - through February 6, inclusive. This action is taken as the result of your conduct on January 20, 1981, which placed in jeopardy the life of a person in your care.
(Grievant's Exhibit #2)

32. Through no fault of Grievant, the days for which he was supposed to be suspended (i.e., February 2, 1981, through February 6, 1981) without pay were charged to Grievant's accumulated annual leave days. As a result, Grievant was paid for that period, but lost five annual leave days.

33. At all times relevant herein, the Agreement provided, in pertinent part, as follows:

ARTICLE XV

DISCIPLINARY ACTION

1. The parties recognize the deterrent value of disciplinary action. Accordingly, the State will:

- (a) act promptly to impose discipline within a reasonable time of the offense;
- (b) apply discipline with a view toward uniformity and consistency; and
- (c) impose a procedure of progressive discipline, in increasing order of severity:

- 1. oral reprimand;
- 2. written reprimand;
- 3. suspension without pay;
- 4. demotion;
- 5. dismissal.

The parties agree there are appropriate cases that may warrant the State bypassing progressive discipline or applying discipline in differing degrees so long as it is imposing discipline for just cause.

3. ...an employee may be dismissed immediately without prior notice or pay in lieu of notice for any of the following reasons:

- (d) conduct which places in jeopardy the life or health...of a person under the employee's care.

7. The appointing authority or his representative may suspend an employee without pay for disciplinary reasons for a period not to exceed 10 workdays. Notice of suspension, with specific reasons for the action, shall be in writing...

34. The Board takes judicial notice of 18 VSA §9144(j), which provides, in pertinent part:

... members of an alcohol crisis team or designated alcohol counselors who act under the authority of this section are acting in the course of their official duty and are not criminally or civilly liable therefore, unless for gross negligence or willful or wanton injury.

OPINION

Grievant has raised various issues in contesting the five-day suspension he received, each of which will be discussed in turn.

Grievant first claims the offense he was charged with was committed after normal working hours, while he was a private citizen; and therefore it was unjustified for the employer to impose discipline for the offense. We disagree. Grievant responded to the call from the Safe House manager January 20, 1981, in his capacity as a Substance Abuse Counselor. It is true the call came at the end of his normal working day, but it is no less true that Grievant's involvement with Safe House is a negotiated part of his job. Moreover, the intoxicated resident of Safe House, whom Grievant was asked to assist in evicting, was one of his assigned clients in his work as a counselor. In responding to the call, Grievant was performing job duties for which he was entitled to be compensated. Why he did not request such compensation is a matter of speculation, but failure to do so was his failing and does not imply he was not acting as a State employee the night of January 20, 1981.

Grievant next claims the cited factual basis given in the letter of suspension is not true and thus, the suspension cannot be upheld. Grievant was notified he was suspended "as a result of your conduct on January 20, 1981, which placed in jeopardy the life of a person in your care." Grievant contends this reason is erroneous since 1) the resident was not under Grievant's care, and 2) the resident's life was never placed in danger.

We reject this claim on both counts. First, there should be no serious doubt the resident was under the care of Grievant, since it was Grievant who arranged for the resident to be taken to the hospital and Canterbury Farm, the detoxification center, and drove the resident to the hospital and drugstore. Second, the claim by Grievant the resident's life was never in danger attacks the specificity of charges against Grievant made in the letter of suspension. Article XV of the Agreement requires specific reasons be given in letters of suspension, and we stated in Grievance of Daniel Swainbank, 3 VLRB 34 (1980), we would not look beyond the reasons given by the employer for the action taken. However, we are wary of turning disciplinary letters into dialectic exercises. Here, the difference between life-threatening and health-threatening conduct on Grievant's part is shadowy, and the letter adequately put Grievant on notice for what misconduct he was being disciplined. We, thus, reject Grievant's procedural claims of deficiency in the letter of suspension.

Grievant also claims no just cause existed for suspension. Article 15 of the Agreement requires that discipline be imposed for just cause. The Agreement does not define just cause, but we recognize the misconduct required to be demonstrated in order for a suspension to be upheld is less serious than that required to uphold a dismissal. Grievance of Naomi Allen, 3 VLRB 143 (1980).

We find Grievant committed various actions the night of January 20, 1981, which placed in jeopardy the resident's health. He failed to take the Librium away from the resident after he became aware Grievant was ingesting the Librium contrary to the directions of the physician's

assistant. This failure is a substantial shortcoming on Grievant's part; particularly since he was aware the effect of taking alcohol and Librium together was synergistic and therefore unpredictable, and he recognized the resident, as an elderly person in bad health, had a decreased drug tolerance. Further, Grievant did not know how much and what type of alcohol the resident had taken and was unaware how much Librium the resident had ingested in the back seat of the car. In sum, the resident may have taken an extremely dangerous amount of alcohol and drugs, yet Grievant did nothing to prevent him from taking more. Grievant may have believed he had legal justification in not taking the Librium away from the resident, but we do not find such inaction to be Department policy, law, or good sense. In fact, it is obvious such inaction violates the fundamental purpose of the helping professions, which is to protect those in their care from further harm as much as possible.

Further actions by Grievant that night demonstrated his apparent indifference to the well-being of the resident. After Grievant became aware the resident had ingested Librium, he did not accompany the resident to Canterbury Farm, the detoxification center, because he was tired. Instead, he arranged for a Safe House manager and resident, whom Grievant was aware were inexperienced in the professional handling of intoxicated persons, to take the resident to Canterbury Farm. Grievant's failure to stay with the resident, who was in a potentially dangerous situation, shows gross negligence. Grievant's accumulated derelictions of duty then increased when he failed to call Canterbury Farm, and notify them the resident had ingested an undetermined amount of Librium on top of an undetermined amount of alcohol, and still had an undetermined amount of

Librium in his possession. It is fortuitous the resident did not suffer serious injury as a result of Grievant's accumulated errors; the fact that such harm did not occur is no defense for Grievant.

Grievant claims he was not on notice his conduct could result in disciplinary action since SRS had no policy regarding employees handling clients' drugs, and Grievant had, in fact, been instructed by a SRS consultant, Dr. Nye, not to dispense medication. In re Grievance of Yashko, 138 Vt. 364 (1980), the Supreme Court held an employee must have fair notice, express or fairly implied, that such conduct on their part might be cause for dismissal. Implicit in jobs in the helping profession, like Grievant's, is the duty to protect those in their care from suffering further harm. Given the nature of the job, Dr. Nye's instructions that persons in jobs like Grievant's should not dispense medication can only reasonably be interpreted as prohibiting them from taking responsibility for the medical care of a person. This is quite a different thing than protecting those in their care from harm. Grievant's actions in this case went against the very nature of his job, and showed a serious lack of judgment and apparent indifference to the resident's health. He was clearly on notice such actions would be grounds for discipline.

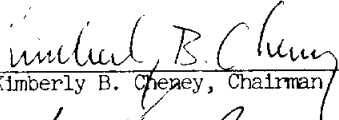
Grievant's last claim is that a five-day suspension was too harsh a penalty. Given Grievant's serious errors here which jeopardized the resident's health, the penalty imposed was reasonable in light of the offense established.


ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED the Grievance of Kurt Erlanson is DISMISSED.

Dated this 21st day of January, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.

James S. Gilson